United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1243

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

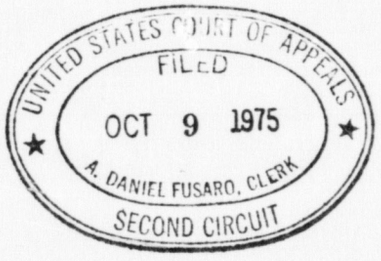
GREGORY CHU, T/N DONALD GEE,

Defendant-Appellant.

- x

REPLY BRIEF FOR DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WARNER AND GILLER , P.C.
500 Fifth Avenue
New York, New York 10036
(212) 354-5454

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PRELIMINARY STATEMENT

The defendant submits this Reply Brief to correct misleading statements and errors of law in the Government's main brief.

ARGUMENT

United States v. DeCicco Applies

Contrary to the Government's footnote attempt to distinguish United States v. DeCicco, 435 F. 2d 478 (2d Cir. 1970)(Government's Br. p. 7), the facts of that case are remarkably close to the facts here. Defendant wishes to stress that the admissibility of the alleged prior criminal

act really turns on the word "outweigh," as used by this Court in United States v. Papadakis, 510 F. 2d 287, 291 (2d Cir. 1975). Does the probative value of the prior criminal act "outweigh" its prejudice? Here, as in DeCicco, the answer should be no.

In DeCicco, contrary to the Government's delicately phrased footnote on page 7 of its Brief, the Court held that the prior act was prejudicial for all defendants, including the "doers." Now let us look at the actual facts of DeCicco more closely. The numbers in the following quote are added for the ensuing discussion:

> In this case [1] almost the entire defense was the attempted impeachment of the Government's principal witness, Paul Parness. [2] The defendants did not admit stealing the art works and seek to avoid conviction on the narrow ground that they did not intend to transport the property in interstate commerce. [3] Nor did any of the defendants claim to have been laboring under any misconception that the Hanley treasures were not stolen - which would have been an incredible claim, indeed! [4] Nor did the Government's case raise any substantial issue as to whether any of the defendants knew what they were doing or whether they knew what they intended to do with the art treasures. [5] Therefore, the defense's only hope in this case was to attack Paul Parness' credibility and thereby to raise any reasonable doubt about the veracity of his account of what the defendants did or said. [6] This is not a case where, if one accepts Paul Parness' testimony at face value, the statements and acts of the defendants lead to equivocal inferences. Parness' story, if believed, leads ineluctably to the conclusion that the defendants knew what they were doing. . . .

[1] Here, the entire defense was the attempted impeachment of the Government's principal witness, Barry Cohen. [2] The defendant did not admit selling the heroin and try to

avoid conviction on some other narrow ground that would have negated intent or federal jurisdiction. [3] Nor did the defendant claim to have been laboring under any misconception that the heroin was not heroin. [4] Nor did the Government's case raise any substantial issue as to whether the defendant knew what he was doing. [5] The defendant's only hope in this case was to attack Barry Cohen's credibility and thereby to raise a reasonable doubt about the veracity of his account of what the defendants did or said. [6] This is not a case where, if one accepts Barry Cohen's testimony at face value, "equivocal inferences" are possible. Cohen's testimony, if believed, leads ineluctably to the conclusion that the defendant knew what he was doing.

The parallel is nearly exact. So should the conclusion be. In DeCicco, the Court said that "whatever probative value the prior crimes of DeCicco and Gregory Parness added to the prosecution's case on the issue of defendants' intent to commit the conspiracy here claimed was far outweighed by the unwarranted inference the jury was permitted to draw. . . ." 435 F. 2d at 484 (emphasis added).

United States v. Klein is Not in Point

The Government relies heavily on United States v. Klein, 340 F. 2d 547 (2d Cir. 1965). The case is distinguishable. There, Klein and a co-defendant were charged with interstate transportation of forged securities. Klein and

the co-defendant had been seen entering seven banks in attempts to cash stolen travelers cheques. The co-defendant testified at Klein's trial and "emphatically denied that Klein had any idea that the cheques were stolen or forged or that Klein had ever seen the cheques." 340 F. 2d at 548. The Court admitted evidence of a prior similar criminal act by Klein because it was "so highly relevant to the issues of knowledge and intent." Id at 549.

Klein is different from this case. Here, the defendant did not claim that he was an innocent, unaware of the reason why Barry Cohen wanted to go to the Henry Hudson Parkway Overlook. His defense was that the deal was Cohen's deal, not his deal. Under United States v. Garguilo, 310 F. 2d 249, 253 (2d Cir. 1962); United States v. Terrell, 474 F. 2d 872, 875 (2d Cir. 1973), even a knowing presence at the scene of the crime does not make the defendant guilty. Klein denied knowledge of what was going on. The defendant here did not deny such knowledge.

This Court has never extended the inclusory rule with regard to prior criminal acts to a Garguilo-Terrell defense. It should not do so. The Garguilo-Terrell defense is a fact defense. It is not a defense that argues for interpretation of innocence based on some "equivocal" act. The defense contends that the prosecutor has failed to prove enough facts to amount to the commission of a crime. If proof of a prior criminal act is allowed where that defense

is asserted, it is like saying to the jury "He did it before and he was doing it again." This is exactly the way in which a jury is not permitted to use prior criminal acts. Yet it is the only way they logically could use such evidence under these facts. It was not allowed in DeCicco and it should not be allowed here.

The "Possession With Intent to Distribute" Argument

Throughout its brief, the Government argues that since it was charging "possession with intent to distribute" a controlled substance, intent was an issue and therefore a prior criminal act was admissible. This is ingenuous. Intent is always an issue in every criminal case, except for the very few acts for which there is absolute liability. If the mere presence of intent as an abstract, theoretical issue is enough to justify the introduction of a prior criminal act, there is no such thing as the inclusory rule. There is no rule. Prior criminal acts will always come in. Intent was also a theoretical issue in DeCicco, but the Court did not limit itself to a mechanical reading of the indictment. It is necessary to examine the facts. It is the facts, not the abstract charge, that controls the application of the inclusory rule.

United States v. Brettholz

Despite the Government's attempt to cite United States v. Brettholz, 485 F. 2d 483 (2d Cir. 1973), in its favor (Government Br. p. 10-11), the case further supports defendant's argument. There, evidence of prior sales of cocaine were admitted at defendants' trial for possession with intent to distribute cocaine. It is clear from the opinion that the evidence of prior criminal activity was admitted only because "intent was placed in issue by the defendants themselves in maintaining that they had gone to the Prince House not with the intention of selling cocaine . . . but with the intention of purchasing marijuana for their own use." 485 F. 2d at 488. No such "state of mind" defense was made here.

The Scope of Cross-Examination

At the close of the Government's case, the defendant was faced with a difficult choice. Barry Cohen had made himself out to be a pure innocent, pressured by the defendant to assist in the crime here charged, although Cohen had never done anything like this before. Defense counsel was aware that Cohen was lying through his teeth. The informant had been involved in drugs with Cohen for many years. Defense counsel was faced with a probable Government argument on summation that the deal was the defendant's deal and

that Cohen, because of an antecedent debt, was forced to assist. The defense called the informant, Colombo, for the limited purpose of impeaching Cohen's credibility (as the Government itself admits, Government's Br. p. 4). The defense would then be able to counteract any Government argument that Cohen was an innocent, used by the defendant. Accordingly, the defense limited its questions of Colombo to that sole issue - that Cohen lied about his drug involvement.

On cross-examination, over objection, the Government was allowed to go substantially beyond this limited direct testimony. The defense relied, as it had a right to do, on the rules governing the scope of cross-examination. The Government had already rested its case. It is respectfully submitted that under the Second Circuit cases cited in defendant's main brief, it was improper to permit the Government to question Colombo about a prior criminal act with the defendant when the substance of Colombo's direct testimony did nothing more than show that Barry Cohen was a liar.

CONCLUSION

The conviction should be reversed and a new trial ordered.

Respectfully submitted,

WARNER AND GILLERS, P.C.
Attorneys for Defendant-Appellant
500 Fifth Avenue
New York, New York 10036

OF COUNSEL:

Stephen Gillers

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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-against-

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AFFIDAVIT OF SERVICE BY MAIL

Docket No. 75-1243

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ANN M. GERLOCK, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 418 East 81 Street, New York, New York. On October 8, 1975, deponent served/the within Reply Brief for Defendant-Appellant upon Paul J. Curran, attorney for United States of America, in this action, at United States Courthouse, Foley Square, New York, New York 10007, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

two copies of

Ann M. Gerlock
ANN M. GERLOCK

Sworn to before me this
8th day of October, 1975.

STEPHEN GILLERS
Notary Public, State of New York
No. 31-4507113
Qualified in New York County
Commission Expires March 30, 197...